

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ANITA KEELER)	
Claimant)	
VS.)	
)	Docket No. 223,811
CANDLEWOOD HOTEL)	
Respondent)	
AND)	
)	
ZURICH INSURANCE COMPANY)	
Insurance Carrier)	

ORDER

Respondent appeals the January 14, 2000, Award of Administrative Law Judge John D. Clark. The Administrative Law Judge granted claimant a 57 percent permanent partial disability based upon a 74 percent loss of tasks and a 40 percent loss of wages. Oral argument before the Board was held on June 9, 2000.

APPEARANCES

Claimant appeared by her attorney, Dennis L. Phelps of Wichita, Kansas. Respondent and its insurance carrier appeared by their attorney, Christopher J. McCurdy appearing for Kurt W. Ratzlaff of Wichita, Kansas.

RECORD AND STIPULATIONS

The record and stipulations set forth in the Award of the Administrative Law Judge were adopted by the Appeals Board for the purposes of this award.

ISSUES

What is the nature and extent of claimant's injury and/or disability? More particularly, respondent contends that the task loss opinion issued by Pedro A. Murati, M.D., is inadmissible in that it was based upon an invalid functional capacity evaluation

performed upon claimant at respondent's request. The respondent requests that the Board find claimant has failed to prove any task loss in this record.

In the alternative, claimant argues Dr. Murati's 74 percent task loss is supported by the record. Claimant further contends that the 40 percent wage loss found by the Administrative Law Judge is inappropriate, as claimant was not working at the time of the regular hearing. Therefore, a 100 percent wage loss should be averaged with the claimant's task loss of 74 percent for a 57 percent permanent partial disability to the body as a whole.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record filed herein, the Appeals Board finds as follows:

The Appeals Board finds the Administrative Law Judge's Award should be affirmed. The Board agrees with the Administrative Law Judge's analysis of the evidence as set forth in the Award. Furthermore, the Board concludes the Award sets out findings of fact and conclusions of law that are accurate and supported by the record. It is not necessary to repeat those findings and those conclusions in this Order.

Respondent objects to the use of the 74 percent task loss issued by Dr. Murati in this matter. Respondent contends that Dr. Murati's task loss is flawed in that it relies upon a functional capacity evaluation performed on claimant on March 9, 1999, which was found to be invalid. However, Dr. Murati, while acknowledging that he did use the functional capacity evaluation in order to reach both his restrictions and his task loss opinion, also testified that he found his restrictions to be appropriate restrictions for claimant given both the injury and the resulting surgery, irrespective of the functional capacity evaluation.

Dr. Murati, after considering the task list prepared by vocational expert Jerry Hardin, found 42 of 62 tasks which claimant could no longer perform as a result of his injuries with respondent. This 74 percent task loss opinion is the only task loss opinion contained in this record. Uncontradicted evidence which is not improbable or unreasonable may not be disregarded unless it is shown to be untrustworthy. Anderson v. Kinsley Sand & Gravel, Inc., 221 Kan. 191, 558 P.2d 146 (1976). Respondent does raise concerns regarding the trustworthiness of Dr. Murati's opinion. However, the Appeals Board finds that Dr. Murati sufficiently answered those concerns regarding claimant's efforts during the functional capacity evaluation.

The Appeals Board further finds that the 40 percent loss of wages assessed by the Administrative Law Judge is accurate. While claimant contends a 100 percent loss of

wages is more appropriate, the Appeals Board finds claimant failed to put forth a good faith effort in her search for post-injury employment, as is required by Copeland v. Johnson Group, Inc., 24 Kan. App. 2d 306, 944 P.2d 179 (1997). Claimant testified in detail regarding her job search between being released by Eustaquio Abay, II, M.D., on March 23, 1999, after claimant's back surgery, and the July 21, 1999, regular hearing, a period of over four and a half months. Claimant's efforts at seeking employment involved contacting approximately seven businesses in or around the Wichita area. She submitted applications at only two of those seven businesses. The two applications were submitted to Sedgwick County and the City of Wichita. Both jobs with those entities required that claimant be able to use computers. Claimant acknowledged she was not experienced with Word Perfect and was, thus, not properly trained for those two positions. Claimant's other job contacts included Siena, a home health care facility, where she applied as a cook, to transport the elderly or to grocery shop for the elderly. Claimant confirmed none of those positions fell within her medical restrictions. Claimant also applied at Resthaven as a counselor, but acknowledged she had no experience or training in counseling. Claimant's other contacts included LeShay's Essence of Hair, Compliments of Connie and Smart Styles, all beauty shops. Claimant acknowledged the requirements of a beautician exceeded her medical restrictions. Claimant attempted to perform a shampoo procedure at one of the facilities, but was unable to complete the procedure because of back pain.

The Appeals Board finds the limited attempts by claimant to obtain post-injury employment do not constitute a good faith effort as required by Copeland. The Administrative Law Judge found the opinion of vocational expert Jerry Hardin, that claimant had the ability to earn \$6 per hour working 40 hours per week, to be persuasive and imputed to claimant a \$240 post-injury average weekly wage, resulting in a 40 percent loss of wage earning ability. While the Administrative Law Judge's Award neither specifically discusses good faith nor cites Copeland, the imputing of the wage implies that the Administrative Law Judge found claimant's efforts to be less than satisfactory.

When comparing claimant's 74 percent task loss and her 40 percent wage loss, the Appeals Board finds that the 57 percent permanent partial general disability awarded by the Administrative Law Judge is appropriate and adopts same as its own.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated January 14, 2000, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of June 2000.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Dennis L. Phelps, Wichita, KS
Kurt W. Ratzlaff, Wichita, KS
John D. Clark, Administrative Law Judge
Philip S. Harness, Director